Tunde Apatira & Ors v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05–6 OF 1997(P)

EUSOFF CHIN CHIEF JUSTICE, LAMIN PCA, WAN ADNAN CJ (MALAYA), MOHAMED DZAIDDIN FCJ AND GOPAL SRI RAM JCA

24 JUNE 1999

Criminal Law *— Dangerous Drugs — Trafficking — Presumption — Whether presumption arise by relying on joint operation of presumptions under s 37(d) and (da) of Dangerous Drugs Act 1952 — Whether express affirmative finding of possession necessary before trafficking presumed — Evidence showed accused in possession of drugs — Whether reasonable tribunal will find accused in actual possession of drugs independently of s 37(d)*

The appellants were convicted with the offence of trafficking in drugs contrary to s 39B of the Dangerous Drugs Act 1952. At the conclusion of the trial, the learned judicial commissioner found the appellants guilty. The convictions were later affirmed by the Court of Appeal (see [1997] 3 MLJ 644) and hence the appeal. The main argument of the appellants rests on the complaint that the approach adopted by the trial court and the Court of Appeal runs contrary to the decision of the court in *Muhammed bin Hassan v PP* [1998] 2 MLJ 273. The appellants complained that both courts below had resorted to the presumption under s 37(da) of the Act after invoking the presumption under s 37(d) thereof. However, the learned deputy public prosecutor argued that even if the direction in *Muhammed bin Hassan* was not applied in the case, it makes no difference to the final result of the case.

Held, dismissing the appeals:

(1) The learned judge had presumed trafficking by relying on the joint operation of the presumptions under s 37(d) and (da) of the Act. This is contrary to the proper direction of law in *Muhammed bin Hassan v PP* (see pp 262I–263A). To constitute 'possession' under s 37(da) of the Act , so as to be capable of forming one of the ingredients giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence (see p 263G).

(2) As a general rule, the appellate court will in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally a conviction will be upheld despite a misdirection where the court is satisfied, that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction (see p 266G). There is no dispute about the central facts relating to the possession of the drugs. It was established by the evidence and accepted by the learned judge that the drugs in question were found in packets within the stomachs of the appellants. Each appellant had swallowed a packet containing the

drug. The totality of the evidence reasonably supports the conclusion that the appellants were in actual possession of the proscribed drug at the time of their initial detention. A reasonable tribunal armed with the same facts and properly directing itself would have concluded that the appellants were found in actual possession of the heroin in question, independently of the presumption in s 37(d) of the Act (see pp 264H–265B).

[**Bahasa Malaysia summary**

Perayu-perayu telah disabitkan untuk kesalahan mengedar dadah bercanggah dengan s 39B Akta Dadah Berbahaya 1952. Di akhir perbicaraan, pesuruhjaya kehakiman yang arif telah mendapati perayu-perayu bersalah. Sabitan-sabitan tersebut telah disahkan oleh Mahkamah Rayuan (lihat [1997] 3 MLJ 644) dan dengan itu rayuan dibuat. Hujah utama perayu-perayu adalah berdasarkan aduan bahawa pendekatan yang diterima oleh mahkamah perbicaraan dan Mahkamah Rayuan adalah bercanggah dengan keputusan *Muhammed bin Hassan v PP* [1998] 2 MLJ 273. Perayu-perayu mengadu bahawa kedua-dua mahkamah di bawah telah membangkitkan anggapan di bawah s 37(da) Akta tersebut selepas membangkitkan anggapan di bawah s 37(d). Namun, timbalan pendakwa raya yang arif telah berhujah bahawa walau sekalipun arahan di dalam *Muhammed bin Hassan* tidak dipakai di dalam kes, ia tidak akan membawa sebarang perubahan kepada keputusan kes tersebut.

Diputuskan, menolak rayuan-rayuan tersebut:

(1) Hakim yang arif telah membuat anggapan mengedar dadah dengan bergantung kepada operasi bersama anggapan di bawah s 37(d) dan (da) Akta tersebut. Ini adalah bercanggah dengan arahan undang-undang yang wajar di dalam *Muhammed bin Hassan v PP* (lihat ms 262I–263A). Untuk terjumlah kepada 'milikan' di bawah s 37(da) Akta tersebut agar ia boleh menjadi sebahagian daripada ramuan yang membangkitkan anggapan mengedar dadah, mestilah terdapat penemuan nyata yang sah (berbanding dengan anggapan undang-undang) milikan seperti yang dimaksudkan di dalam undang-undang jenayah, berdasarkan keterangan (lihat ms 263G).

(2) Sebagai peraturan am, mahkamah rayuan di dalam perjalanan peristiwa yang biasa, akan membatalkan suatu sabitan apabila terdapat salah arahan. Namun suatu sabitan akan disahkan walaupun terdapat salah arahan apabila mahkamah berpuas hati, bahawa suatu tribunal munasabah akan mensabitkan tertuduh di atas keterangan yang ada di atas arahan yang wajar (lihat ms 266G). Tiada terdapat pertikaian mengenai fakta-fakta berkenaan milikan dadah tersebut. Ia telah dibuktikan melalui keterangan dan diterima oleh hakim yang arif bahawa dadah yang

dipersoalkan telah ditemui di dalam paket-paket di dalam perut perayu-perayu. Setiap perayu telah menelan paket yang mengandungi dadah tersebut. Keseluruhan keterangan yang munasabah menyokong kesimpulan bahawa perayu-perayu berada di dalam milikan sebenar dadah yang diharamkan pada masa penahanan awal. Suatu tribunal yang munasabah yang berdepan dengan fakta-fakta yang sama dan dengan arahan yang wajar akan menyimpulkan bahawa perayu-perayu ditemui di dalam milikan sebenar heroin yang dipersoalkan, walaupun tanpa bergantung kepada anggapan di dalam s 37(d) Akta tersebut (lihat ms 264H–265B).]

Notes

For cases on the Dangerous Drugs Act 1952 s 37(d) and (da), see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 49–52.

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209 (refd)
Chiu Nang Hong v PP [1965] 1 MLJ 40 (refd)
Haryadi Dadeh v PP [2000] 4 MLJ 71 (refd)
Khoo Hi Chiang v PP [1994] 1 MLJ 265 (refd)
Krishna Murthy v Abdul Subban (1965) 1 Cr LJ 565 (refd)
Mraz v the Queen (1955) 93 CLR 493 (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (folld)
PP v Ong Cheng Heong [1998] 6 MLJ 678 (refd)
R v Shivpuri [1986] 2 All ER 334 (refd)
Ratten v R (1974) 131 CLR 510 (refd)
Sweet v Parsley [1970] AC 132 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 92(1)
Criminal Appeal Act 1912 [NSW]
Criminal Procedure Codes s 422
Dangerous Drugs Act 1952 ss 37(d), (da), 39B

Karpal Singh (*Gurbachan Singh*, *Jagdeep Singh Deo* and *Gobind Singh Deo* with him (*Karpal Singh & Co*) for the appellants.

Mohd Yusof bin Hj Zainal Abiden (Senior Deputy Public Prosecutor) (*Tun Majid bin Tun Hamzah* with him) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):**.** Each of the appellants before us was convicted of an offence of trafficking in drugs contrary to s 39B of the Dangerous Drugs Act 1952 ('the Act '). At the trial, each appellant faced a separate charge. As against the first appellant, the charge was that he had trafficked in 117.8g of heroin. The charge against the second appellant was that he had trafficked in 231.7g of heroin. The

third appellant was charged with trafficking in 262.8g of heroin. All the appellants were jointly tried before Judicial Commissioner Jeffrey Tan, at the Penang High Court. At the conclusion of the trial the learned judicial commissioner found the appellants guilty and imposed upon each of them the mandatory death sentence prescribed by the Act. The appellants appealed against their convictions to the Court of Appeal. That court, in a judgment delivered by Abdul Malek Ahmad JCA, dismissed the appeal. The appellants thereafter appealed to this court.

The facts that lie at the core of this appeal appear sufficiently in the judgment of the Court of Appeal delivered by Abdul Malek Ahmad JCA. It is reported in [1997] 3 MLJ 644. We therefore find it unnecessary to re-visit the facts in this judgment. Suffice that we deal with the main arguments advanced in support of the appeal.

A number of grounds were argued in support of the appeal. However, the mainstay of the argument of the appellants rests on the complaint that the approach adopted by the trial court and the Court of Appeal runs foul of the decision of this court in *Muhammed bin Hassan v PP* [1998] 2 MLJ 273. This was added as an additional ground on the appellants' motion to amend their petition of appeal which application, on being unopposed, was granted.

The appellants' particular complaint is that both courts below had resorted to the presumption under s 37(da) of the Act after invoking the presumption under s 37(d) thereof. These two provisions read as follows:

> In all proceedings under this Act or any regulation made thereunder —
>
> (d) any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
>
> (da) any person who is found in possession of —
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> (vi) 15 grammes or more in weight of heroin,
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> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

The learned judge at first instance approached the proof of trafficking as follows:

> Therefore *for the chain of presumptions to apply*, that is from custody or control to possession and thence to trafficking, there must foremost be the primary and unequivocal evidence of the accused's respective custody or control of the 22, 44 and 50 'sausage-like packages' containing the heroin. (Emphasis added.)

Now, this sentence, apart from suffering from the infirmity of poor construction, amounts to a misdirection of law. The judge obviously considered himself to be able in law to presume trafficking by relying on the joint operation of the presumptions under s 37(d) and (da) of the Act . The

judgment when read as a whole confirms this to be his line of reasoning. This runs counter to the proper direction of law that commended itself to this court in *Muhammed bin Hassan v PP*. The learned Chief Judge of Sabah and Sarawak who spoke for this court upon that occasion summed up the approach that trial judges ought to adopt in relation to the proof of possession in the context of s 37(da) of the Act (at p 287):

> In our view, there is a clear undeniable distinction between the word 'deemed' used in s 37(d) and the word 'found' employed in s 37(da) of the Act. The 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da) of the Act are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) of the Act by the prosecution), the court must in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s 37(da) of the Act connotes a finding after a trial by the court.
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> Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s 37(d) of the Act and those required to raise 'presumed … trafficking' under s 37(da) of the Act are different. To come to the presumptions of possession and knowledge under s 37(d)of the Act, one need only to arrive at a finding of having had 'in custody or under … control anything whatsoever to containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of trafficking' under s 37 (da) of the Act , a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). *In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption's contended by the learned deputy public prosecutor — a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not*. In our view, to constitute 'possession' under s 37(da) of the Act , so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence. (Emphasis added.)

The learned deputy provided two responses to the appellants' submissions. He first submits that *Muhammed bin Hassan* was wrongly decided and ought no longer to be followed. His second submission is that even if this court correctly interpreted s 37(da) of the Act in *Muhammed bin Hassan*, the failure of the courts below in the present case to adhere to that interpretation occasioned no miscarriage of justice to the appellants before us.

With respect, we are unable to accept the learned deputy's invitation to depart from *Muhammed bin Hassan* for three reasons. In the first place,

Muhammed bin Hassan is a very recent decision of this court. It is bad policy for us as the apex court to leave the law in a state of uncertainty by departing from our recent decisions. Members of the public must be allowed to arrange their affairs so that they keep well within the framework of the law. They can hardly do this if the judiciary keeps changing its stance upon the same issue between brief intervals. The point assumes greater importance in the field of criminal law where a breach may result in the deprivation of life or liberty or in the imposition of other serious penalties. Of course, if a decision were plainly wrong, it would cause as much injustice if we were to leave it unreversed merely on the ground that it was recently decided. In a case as the present this court will normally follow the approach adopted by the apex courts of other Commonwealth jurisdictions as exemplified by such decisions as *R v Shivpuri* [1986] 2 All ER 334.

The second reason is closely connected to the first. It also has to do with certainty in the law. The decision in Muhammed bin Hassan has been affirmed by our courts (see, *PP v Ong Cheng Heong* [1998] 6 MLJ 678) and convictions have been quashed by this court acting on its strength. See, for example *Haryadi Dadeh v PP* [2000] 4 MLJ 71. If we accept the learned deputy's invitation to depart from *Muhammed bin Hassan*, it will throw the law into a state of uncertainty and cast doubt on the accuracy of the pronouncements made in those cases that have so recently applied the interpretation formulated in that case. It is bad policy for us to keep the law in such a state of flux especially upon a question of interpretation of a statutory provision that comes up so often for consideration before the courts.

Lastly — and this is the most important reason — we agree with the interpretation placed by the learned Chief Judge of Sabah and Sarawak on s 37(da) of the Act. The logic and reasoning for interpreting that subsection in the way in which it was done in *Muhammed bin Hassan* appear sufficiently from the judgment in that case. It requires no repetition. All we need say is that para (da) of s 37 is differently constructed from para (d) of that section and must therefore carry an different meaning. As the Act is a penal statute, any ambiguity in language should be resolved in an accused's favour: *Sweet v Parsley* [1970] AC 132.

For the foregoing reasons, we reject the argument of the respondent to the effect that *Muhammed bin Hassan* was wrongly decided and ought no longer to be applied.

The alternative submission of the learned deputy is that even if the direction in *Muhammed bin Hassan* was not applied in the present case, it makes no difference to the final result. This is a far more formidable argument.

There is no dispute about the central facts relating to the possession of the drugs. It was established by the evidence and accepted by the leaned judge that the drugs in question were found in packets within the stomachs of the appellants. Each appellant had swallowed a packet containing the drug. The learned trial judge found the appellants' version of how they had come to swallow the drugs in question as being implausible.

The totality of the evidence reasonably supports the conclusion that the appellants were in actual possession of the proscribed drug at the time of their initial detention. It follows that even if the learned trial judge and the learned judges of the Court of Appeal had directed themselves in accordance with the law as laid down by this court in Muhammed bin Hassan they would have arrived at the identical conclusion. To put it in another fashion, a reasonable tribunal armed with the same facts and properly directing itself would have concluded that the appellants were found in actual possession of the heroin in question, that is to say, independently of the presumption in s 37(d) of the Act. Since the quantity of the heroin so found in the possession of the appellants was several times greater than the statutory minimum of 15g, the court was entitled to conclude that they were trafficking in the said drug.

The course open to this court upon such a conclusion as aforesaid is not in doubt. Generally speaking, an appellant who is able to demonstrate a misdirection of law is entitled to have his conviction quashed. And an appellate court will, when there has been a miscarriage of justice, intervene and set aside a conviction where there has been withheld from an accused a rule of law operating in his favour: *Chiu Nang Hong v PP* [1965] 1 MLJ 40.

The expression 'miscarriage of justice' appears in the proviso to s 92(1) of the Courts of Judicature Act 1964. A similar expression, 'failure of justice' appears in s 422 of the Criminal Procedure Code. They mean the same thing. For, the same result follows when justice either fails or miscarries. The proviso reads as follows:

> Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

The way in which the proviso is to be applied has been considered in several cases. Three of these deserve mention.

In *Mraz v the Queen* (1955) 93 CLR 493 at p 514, Fullagar J, when addressing a similar provision in the New South Wales Criminal Appeal Act 1912 said:

> It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the act, must show that he ought not to have been convicted of anything. It ought to be read and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

In *Krishna Murthy v Abdul Subban* (1965) 1 Cr LJ 565 at p 576, Hegde J when dealing with the Indian equipollent of s 422 of our Criminal Procedure Code said:

> The expression 'a failure of justice has in fact occasioned thereby' found in s 535(1), Cr PC does not connote that the court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose the legislature need not have introduced the conception of 'failure of justice' in ss 535 and 537, Cr PC. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Chapter XIX, Cr PC. In law the expression 'justice' comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr PC have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

In *Ratten v R* (1974) 131 CLR 510 at p 516. However, Barwick CJ, explained the way in which the proviso is to be applied to particular circumstances. He said:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.

So it comes to this. As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied, that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209 exemplifies the general rule, while that in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 illustrates the exception.

Having scrutinized the record with care, we are satisfied that this is an appropriate case for the application of the proviso. The evidence, both direct and circumstantial, against the appellants is entirely overwhelming. A court applying s 37(da) of the Act in the manner required by *Muhammed bin Hassan* would have nevertheless convicted the appellants on the available evidence.

A For these reasons, the appeals herein were dismissed. The convictions and sentences imposed on the appellants were affirmed.

Appeals dismissed.

Reported by Benjamin Yong

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